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No. 74-883

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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FEDERAL POWER COMMISSION, PETITIONER

*v.*

JOHN E. MOSS, ET AL.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR MOSS ET AL. IN OPPOSITION

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February 20, 1975

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### QUESTION PRESENTED

Whether the Federal Power Commission may, at the time it grants a producer a certificate under Section 7(c) of the Natural Gas Act to commence a sale of natural gas in interstate commerce, simultaneously "pre-grant" that producer authority to abandon its sale, under Section 7(b) of the Act, when its contract expires, without regard to the continuing need of the public for service at the time abandonment will be effected.

### STATEMENT

In April 1972, the Federal Power Commission--all of whose members had gone on record as opposing continued federal regulation of interstate sales of natural gas by producers--

announced that it was considering an "optional procedure" for regulation of producers. Premised on the Commission's view that regulation under the Natural Gas Act had the effect of discouraging producer sales in interstate commerce, the proposed "optional procedure" would substantially diminish the impact of regulation on producers electing to come under the new procedure: they would be free to charge rates in excess of the applicable area ceilings; they would be free during the term of their contract to increase their rates without a contemporaneous investigation into the propriety of the increase; and they would be free to abandon service at the end of the contract term.

The optional procedure was vigorously opposed by various parties, including respondents, a group of twenty-one congressmen* who were concerned that the Commission's program amounted to deregulation without congressional sanction.

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* Respondents are John E. Moss, John D. Dingell, Ogden R. Reid, Bella S. Abzug, Herman Badillo, Jonathan B. Bingham, Phillip Burton, Silvio O. Conte, Charles C. Diggs, Jr., George E. Danielson, Thaddeus J. Dulski, William D. Ford, Seymour Halpern, Robert L. Leggett, Bertram L. Podell, Benjamin S. Rosenthal, Robert O. Tiernan, Lionel Van Deerlin, Charles A. Vanik, Jerome R. Waldie, and Sidney R. Yates. At the time of initiation of the proceedings below, each was a duly elected member of the United States House of Representatives.



Despite such opposition, however, the Commission, in August 1972, without holding an evidentiary hearing and without undertaking any evaluation of the anticipated benefits as against the probable costs of its new program, adopted the new "optional procedure" substantially in the form originally proposed, Order No. 455, 48 FPC 218. Following the Commission's denial of rehearing, Order No. 455-A, 48 FPC 477, respondents petitioned for review in the United States Court of Appeals for the District of Columbia Circuit.

The opinion of the court of appeals which is the subject of the Commission's instant petition for certiorari was issued on August 15, 1974, Moss v. F.P.C., 502 F.2d 461. Written by Judge Robb for a unanimous panel (Judges Tamm, MacKinnon, and Robb), the opinion, while sustaining the Commission's action in major part, reflects the court's considerable difficulty with the legality of the Commission's optional procedure.

1. On the principal issue--the standard to be used to fix prices under the "optional procedure", the court noted that "the Rule itself is ambiguous" and was "open to the construction that contract rates will be certified automatically as just and reasonable" (Pet. App. A 9a)--a construction that under this Court's recent decision in F.P.C. v. Texaco Inc., 417 U.S. 380, would render the rule invalid. The court, however, concluded that it should sustain the rule on the Commission's representation that in reviewing rates under the optional procedure the established standards of Section 4 of the Act--requiring consideration of the seller's

costs--would be respected. The court held (Pet. App. A 11a):

> "If in weighing the evidence the Commission violates those substantive standards, the aggrieved party will have a remedy in the courts. On the present record, however, we must assume that the Commission will abide by the standards of the statute and the promises it has made. We cannot condemn the Commission on the theory that it may not do what it has promised to do."

2. On the challenge to the Commission's authority to approve future rate increases in advance, the court of appeals noted that "any increases initially approved remain subject to review in future proceedings under Section 4(e)"--i.e., a future Commission could determine to suspend the increase and require justification for the increase at the time of its proposed effective date (Pet. App. A 13a). And while declining to bar the Commission's endeavor to make an advance determination of the reasonableness of future increases, the court indicated that it was "skeptical about the ability of the Commission to succeed in this endeavor" (id.):

> "Whether it succeeds will depend upon the evidentiary basis for the escalations proposed in a given contract and the reasonableness of Commission findings and projections supporting and approving such escalations. The question is one of



> proof which can be answered only on a record setting out a particular proposal and the evidence supporting it."

3. The court sustained without qualification a provision of the new rule that would permit an applicant under the optional procedure to commence service immediately upon the filing of its application, and if the application had not been disposed of within six months, to charge the contract price free from refund obligation even if the subsequent decision on the merits should conclude that the contract price exceeded the maximum allowable under the optional procedure (Pet. App. A 14a-16a).

4. Despite its predisposition to interpret the provisions of the Commission's rule in a manner that would render it lawful under the Natural Gas Act, the court could find no basis whatever for the "pregranted abandonment" provision of §2.75(e) of the Regulations. Section 7(b) of the Act prohibits a natural gas company from abandoning service without permission from the Commission, "after due hearing, and a finding by the Commission . . . that the present or future public convenience or necessity permit such abandonment." Under §2.75(e) the Commission would "pregrant" abandonment authority at the time of initial Section 7(c) certification--some five or ten or twenty years in advance of actual abandonment, and without regard to the continuing need of the public for service. The court noted that "pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses" (Pet. App. A 21a), and accordingly held that such procedure was not contemplated or authorized by Section 7(b).

The Commission's applications for rehearing and for rehearing en banc were denied, without dissent, on September 19, 1974, and the Commission's petition for a writ of certiorari in this Court followed.

**ARGUMENT**

The Commission's petition for a writ of certiorari seeks to review but a single part of an integrated court of appeals' decision. That decision was carefully and thoughtfully drafted: it recognized that there was substantial merit to the position urged by Moss et al. that the "optional procedure" amounted to partial deregulation, yet it sought to interpret the various provisions of the new rule in a way that would render them consistent with the Natural Gas Act, and, as thus interpreted, capable of being sustained. It was able to follow this approach with each of the challenged provisions but one--the "pregranted abandonment" provision.

The holding of the court below on the abandonment issue is eminently correct; it is not in conflict with any holding by this Court or by any court of appeals, but on the contrary is wholly consistent with every important judicial interpretation of the abandonment provision of the Natural Gas Act; and denial of certiorari in this case would not hamper any important Commission policy under the Natural Gas Act. Moreover, because the challenged holding is, as we have noted, an integral part of a broader approach, grant of certiorari, to be meaningful, would have to bring before the Court all aspects of the Commission's optional procedure regulation.*



1. The Decision Below Is Wholly Consistent With the Statute and With Prior Decisions of This Court and Other Courts of Appeals.

In its effort to persuade this Court to grant certiorari, the Commission states that the decision below "conflicts with decisions of this Court and the Tenth Circuit" (Pet. 6). The Commission is plainly mistaken. No court has ever held that the Commission may, at the time it authorizes the commencement of a sale in interstate commerce, "pregrant" abandonment authority to become effective ten or twenty years later, at the end of the contract term. It is, of course, true that absent regulation--and specifically absent Section 7(b) of the Act--a seller commencing a sale would, without more, be contractually free to discontinue service at the end of the contract term. But as the decided cases under Section 7(b) make clear, natural gas service, once commenced, normally induces a public need in its continuation that precludes abandonment absent a finding that

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* While we do not believe that certiorari is warranted with respect to any aspect of the decision below, we believe that the piecemeal approach urged by the Commission would be especially unfortunate, and accordingly we are, contemporaneously with the filing of this brief in opposition, filing a conditional cross-petition for certiorari on the remaining issues in the case.

the service is no longer required or that alternative service can be obtained, see, e.g., Sunray Oil Co. v. F.P.C., 364 U.S. 137 at 143, 152-54, 156 (1960); Michigan Consolidated Gas Co. v. F.P.C., 283 F.2d 204 (D.C. Cir. 1960), cert. denied, 364 U.S. 913; Transcontinental Gas Pipe Line Corp. v. F.P.C., 488 F.2d 1325 (D.C. Cir. 1973), cert. denied, 417 U.S. 921.

Prior to the issuance of its optional procedure rule, the Federal Power Commission had never held that it had power under Section 7(b) to "pregrant" abandonment years in advance of the date on which abandonment is to occur; in consequence, neither this Court nor any court of appeals had any occasion to pass on whether "pregranted abandonment" would be consistent with the requirements of Section 7(b).

The Commission's present attempt (Pet. 6-10) to argue that an 18-year old Tenth Circuit decision holds to the contrary is altogether unpersuasive: the case involved no question of "pregranted abandonment" and rests on an entirely different set of facts; indeed, the issue was never squarely decided but became moot prior to decision. The Commission's claim (Pet. 6, 9-10) that the opinion below "conflicts with [the] decision of this Court" in Sunray Oil Co. v. F.P.C., 364 U.S. 137 is absurd. First, in Sunray this Court sustained the Commission's grant of a certificate unlimited as to time (and certainly with no "pregrant" of abandonment). Second, the Court based its holding in large part on the need to maintain effective Commission control over abandonment under Section 7(b) to the end that consumers dependent on



continued service might be protected from the untoward consequences of abandonment. Third, the Court expressly stated (364 U.S. at 153, emphasis added):

> "If the Act does not contemplate that in a seller's contract there may inhere the power, of the contract's own accord, to effect a rate change at a future date unchecked by the regulatory scheme, it is hard to believe that it contemplated that contracts would of necessity have the effect of providing for a discontinuance of service, without further leave of the Commission."

Fourth, while noting that the precise issue presented by the instant case was not before it, the Sunray Court expressed considerable doubt "whether, in light of the Act's provisions--particularly the policy expressed in §7(b)--it would be proper for [the Commission] to rely" on considerations of the type urged by the Commission in the instant case to justify pregranted abandonment (364 U.S. at 158).

Thus, the Commission's assertion (Pet. 9) that this Court "specifically endorsed" the Tenth Circuit's 1956 Sunray holding is incorrect (it is also irrelevant, since what is significant for certiorari is conflict with a prior holding, not conflict with a prior "endorsement"); and the Commission's claim that "this Court has clearly stated that the Commission has authority . . . to approve the future termination of service . . . at the time of certifica-

tion" (id.) is belied by even a cursory reading of the Court's opinion.

It should be noted that the Commission's additional argument (Pet. 9-10) reflects a difference with the court of appeals not only as to the proper timing of a Commission determination that abandonment should be permitted--and it is surely difficult to deny the logic of the court's conclusion that a determination that there will be no need for continued service ten or twenty years in the future "requires more clairvoyance than even the Commission's expertise reasonably encompasses"--but even more importantly as to the standard to be used to gauge whether abandonment should be permitted. What the Commission is apparently saying is that since the producer dislikes and may refuse to participate in a regulated market, new sales to the interstate market will be encouraged if the level of federal regulation is reduced--i.e., if the regulated interstate market is made more like the unregulated intrastate market. But that issue was resolved against the Commission only last term. In F.P.C. v. Texaco Inc., 417 U.S. 380 at 400-01, this Court, after noting that regulation, particularly in time of shortage, might serve to discourage increased production of natural gas, went on to define the relationship between the Court, the Commission, and Congress:

> "It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a



> proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process.
>
> "Attempts have been made in the past to exempt producers from the coverage of the Act, but these attempts have been unsuccessful. . . . For the Court to step outside its role in construing this statute, and insert itself into the debate on economics and the public interest, would be an unwarranted intrusion into the legislative forum where the debate again rages on the question of deregulation of natural gas producers."*

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* The Commission's contention (Pet. 2-3) that the optional procedure was necessary to avoid the "rate uncertainty which has prevailed since the early 1960's" is similarly answered by Texaco: rate regulation does induce a measure of uncertainty for the seller, but that is a consequence of the congressional determination that regulation is appropriate for the particular industry, and cannot be set aside by the regulatory agency. Further, the "uncertainty" of which the Commission complains derives not from the rate-making standard, which the optional procedure would modify, but from the statutory review provisions, which would remain unchanged under optional procedure. And, in any event, much of the litigation and delay in fixing "certain" just and reasonable rates over the past twenty years has been attributable to the very producers who would be the beneficiaries of the optional procedure.

2. The Decision Below Will Not Hamper Any Significant Commission Policy Under the Natural Gas Act.

The Commission contends (Pet. 12) that the decision below would, in "the Commission's judgment . . . be likely to undermine" the ability of the optional procedure program to attract supplies to the interstate market. The Commission further suggests (id.) that the decision below "may, in the Commission's judgment, deter new dedications of gas under the emergency certificate program as well." No statistical or evidentiary support is provided; the Court is left to rely on "the Commission's judgment", with no basis for evaluating whether that judgment is reasonable. No real threat to any program is alleged; the Commission merely claims that an untoward result "is likely" or "may" tend to occur. Vagueness aside, the real difficulty with these arguments is that they are but variants of the contentions rejected in Texaco. If, as the Commission continues to assert, regulation has untoward effects, the remedy lies in the amendment of the regulatory statute by the Congress, not by the Commission.

In stressing this Court's eminently correct response in Texaco, we should like to make clear that we do not accept the Commission's claims that its optional procedure and its emergency sales program have worked successfully for the consumer; to the contrary, they appear merely to have increased the price of gas without generating any increase in supply. But those arguments are for other cases, and do not require resolution by this Court here.



**CONCLUSION**

The petition for a writ of certiorari presents no basis for grant of the writ and should accordingly be denied. A fortiori, the Commission's conclusory request that it be granted summary reversal is, in the context of this case, wholly inappropriate.

Respectfully submitted,

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